STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 10, 2014
v	No. 313131 Calhoun Circuit Court
TRON ARIEL ROBINSON, a/k/a JAMIE MARCELLUS WYNNE, Defendant-Appellant.	LC No. 2012-000819-FH

Before: FITZGERALD, P.J., and SAAD and WHITBECK, JJ.

PER CURIAM.

A jury convicted defendant of first-degree home invasion, MCL 750.110a(2); the unlawful killing of an animal, MCL 750.50b; possession of a firearm by a felon, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. On October 22, 2012, the trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to prison terms of 18 to 40 months for first-degree home invasion, 43 to 96 months for the unlawful killing of an animal, 57 to 120 months for possession of a firearm by a felon, and two years' for felony-firearm. We remanded this case for resentencing and, on August 23, 2013, the trial court resentenced defendant to a prison term of 200 months to 40 years for his first-degree home invasion conviction. All other aspects of defendant's original sentence remained the same. We affirm.

Defendant raises three issues pertaining to the effective assistance of defense counsel. Generally, the questions presented by a claim of ineffective assistance of counsel are mixed questions of law and fact; findings of fact by the trial court, if any, are reviewed for clear error, and questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Our review of these unpreserved issues is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish ineffective assistance of counsel, a defendant must "show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To show prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Toma*,

462 Mich at 302-303 (citation omitted). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant first argues that his trial counsel was ineffective for failing to challenge a juror for cause. A defendant has a right to a fair and impartial jury. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). Jurors are presumed to be competent and impartial. *People v Walker*, 162 Mich App 60, 63; 412 NW2d 244 (1987). Prospective jurors may be challenged for cause if they are biased against a party, demonstrate a state of mind or opinion that would prevent them from rendering a just verdict on the facts of the case, or have opinions that would improperly influence a trial verdict, among other reasons. MCR 2.511(D); *People v Lee*, 212 Mich App 228, 249-251; 537 NW2d 233 (1995). The decision whether to challenge a potentially biased juror during voir dire is a matter of trial strategy. *People v Unger*, 278 Mich App 210, 257-258; 749 NW2d 272 (2008). In *Unger*, we recognized that:

> [p]erhaps the most important criteria in selecting a jury include a potential juror's facial expressions, body language, and manner of answering questions. However, as a reviewing court, we cannot see the jurors or listen to their answers to voir dire questions. For this reason, this Court has been disinclined to find ineffective assistance of counsel on the basis of an attorney's failure to challenge a juror.
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> A lawyer's hunches, based on his observations, may be as valid as any method of choosing a jury. [*Id*. at 258 (citations and quotations omitted).]

In this case, the juror in question testified that his home was broken into in July 2012, that $2,000 to $3,000 worth of personal belongings had been stolen, and that the experience would affect his ability to be a fair juror "[a] little bit." After the trial court asked the juror whether he could set aside the "little bit" of prejudice, the juror responded "I'll try." Defendant argues that the juror's "equivocal" statement that he would "try" to set aside the "little bit" of bias demonstrated a state of mind or opinion that would prevent him from rendering a just verdict on the facts of this case.

However, defendant's argument ignores the fact that after the juror said that he would try to set aside any bias, that he indicated that he understood that the break-in at his home was unrelated to this case, that he could abide by the fact that the break-in at his home was irrelevant to this case, and that he accepted that defendant was presumed innocent throughout the trial. And, a juror's promise to keep personal matters separate from a defendant's case may be sufficient to protect the defendant's right to a fair trial. *People v Johnson*, 245 Mich App 243, 256; 631 NW2d 1 (2001). Defendant fails to show that the juror's "little bit" of bias would have prevented him from rendering a just verdict on the facts of this case as required to successfully challenge the juror for cause. MCR 2.511(D); *Lee*, 212 Mich App at 249-251. Thus, defense counsel was not ineffective for deciding not to make a meritless challenge for cause in regard to the juror. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Additionally, contrary to defendant's assertion that defense counsel lacked any apparent trial strategy in retaining the challenged juror, a defense counsel may choose, as a sound trial strategy, to rely on a potentially biased juror's promises of objectivity based on the belief that the juror would subsequently work hard to be objective. "This Court will not substitute its judgment for that of

counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Defendant has failed to show that defense counsel's representation fell below an objective standard of reasonableness. *Toma*, 462 Mich at 302. Therefore, ineffective assistance of counsel has not been established. *Id*.

Defendant next argues that his trial counsel was ineffective for stipulating to the admission of a certified copy of defendant's prior conviction of carrying a concealed weapon. Defendant was charged with possession of a firearm by a felon in this case, and the elements of that crime include that a defendant have a previous felony conviction and that the defendant possessed a firearm. See MCL 750.224f; *People v Perkins*, 473 Mich 626, 629-631; 703 NW2d 448 (2005). The prosecutor was required to prove defendant had a previous felony conviction in this case. Defendant correctly notes that instead of requiring the prosecutor to introduce evidence that a defendant committed a prior felony, a defendant may stipulate to the existence of a prior felony conviction. See *People v Swint*, 225 Mich App 353, 377-379; 572 NW2d 666 (1997). In this case, however, defense counsel did not merely stipulate that defendant had a prior felony conviction, but also stipulated to a certified copy of that conviction of carrying a concealed weapon. Defendant argues that there was no valid trial strategy for defense counsel to specifically stipulate to the carrying a concealed weapon conviction when that conviction was so similar to his other weapons charges in this case. We disagree.

Defense counsel could reasonably have believed that, given the nature of the disturbing facts surrounding defendant's first-degree home invasion and unlawful killing of an animal charges, it was best for the jury to know that defendant's prior conviction was for carrying a concealed weapon, rather than to risk the jury speculating that defendant may have had a more violent felony conviction. Because there was a valid trial strategy that could have supported defense counsel's stipulation, defendant fails to rebut the presumption that defense counsel's stipulation was a matter of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). We will not substitute our judgment for defense counsel's regarding this matter of trial strategy. *Rockey*, 237 Mich App at 76-77. Defendant fails to show that defense counsel's representation fell below an objective standard of reasonableness. *Toma*, 462 Mich at 302. Thus, defendant has not met his burden to show that counsel was ineffective.

Defendant's final ineffective assistance of counsel claim concerns his codefendant's statement that defendant lied about loving her because he did not want her to talk to the police given that he had "four felonies and one more he was supposed to go back to prison." Initially, defendant argues that defense counsel was ineffective for failing to make a motion in limine to exclude his codefendant's testimony regarding defendant's criminal history. However, defendant does not provide any legal support or explanation for that proposition. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). "The failure to brief the merits of an allegation of error constitutes an abandonment of the issue." *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004).

Defendant also argues that defense counsel was ineffective for failing to move for a mistrial after his codefendant provided the statement at issue. "A mistrial should be granted only

for an irregularity that is prejudicial to the rights of the defendant, and impairs his ability to get a fair trial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (citation omitted). Evidence of a prior conviction is prejudicial because of the danger that "a jury will misuse prior conviction evidence by focusing on the defendant's general bad character . . . ." *People v Allen*, 429 Mich 558, 569; 420 NW2d 499 (1988).

The record in this case reveals, however, that the codefendant's challenged statement was an unresponsive, volunteered answer to a proper rehabilitation question posed by the prosecutor. "[A]n unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial," *Haywood*, 209 Mich App at 228, unless "the error complained of is so egregious that the prejudicial effect can be removed in no other way," *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988). Here, any taint from the statement regarding defendant's criminal history could have been removed by a curative instruction and, therefore, no ground for a mistrial was presented. See *id*., (holding that any taint from two witnesses' references to the defendant's other homicides could have been removed by a cautionary instruction, even where the defendant was charged with felony murder). Defense counsel was not ineffective for not making a meritless motion for a mistrial in this case. *Ericksen*, 288 Mich App at 201. Nor has defendant shown prejudice from defense counsel's decision not to move for a mistrial. *Toma*, 462 Mich at 302-303.

Defendant argues that the trial court erred as a matter of due process in permitting the jurors to ask questions of witnesses in this case. This unpreserved issue is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant's reliance on foreign authority, *State v Costello*, 646 NW2d 204, 213-215 (Minn, 2002), in support of his argument that jurors may not ask questions of witnesses during criminal trials is misplaced.[1] In *People v Heard*, 388 Mich 182, 187-188; 200 NW2d 73 (1972), our Supreme Court held that trial courts have the discretion to allow jurors to ask questions of witnesses during a criminal trial. "As long as case law established by our Supreme Court remains valid, this Court and all lower courts are bound by that authority." *People v Tierney*, 266 Mich App 687, 713; 703 NW2d 204 (2005) (citation and quotation omitted). Defendant fails to show plain error in the trial court allowing the jurors to ask questions in this case. *Carines*, 460 Mich at 763.

Defendant also raises an issue in regard to the trial court's original scoring of prior record variable (PRV) 1, MCL 777.51 (prior high severity felony convictions). However, we remanded this case for resentencing, and defendant's issue in regard to PRV 1 was resolved by the trial court on remand. This issue is thus moot. *People v Claypool*, 470 Mich 715, 723 n 8; 684 NW2d 278 (2004). We will generally not decide moot issues. *People v Richmond*, 486 Mich 29, 34; 782 NW2d 187 (2010), amended 486 Mich 1041 (2010).

Defendant argues that the trial court's imposition of the crime victim rights assessment of $130 under MCL 780.905(1) violated the ex post facto clauses of the United States and Michigan

[1] In *Costello*, the Minnesota Supreme Court held that jurors may not ask questions of witnesses during criminal trials in the state of Minnesota.

Constitutions because the $130 assessment was not enacted until after defendant committed the crimes at issue in this case. This argument was rejected in *People v Earl*, 495 Mich 33, ___; ___ NW2d ___ (2014). Consequently, defendant's argument is without merit.

Finally, defendant relies on *Alleyne v United States*, ___US___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), in arguing that the trial court erred in scoring a number of offense variables in this case using factual findings that had not been submitted to a jury and proved beyond a reasonable doubt. In *Alleyne*, ___US___; 133 S Ct at 2155, the United States Supreme Court held that, in regard to sentencing a defendant, "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." On appeal in this case, defendant argues that *Alleyne*'s holding applies to Michigan's statutory sentencing guidelines. This argument was rejected in *People v Herron*, 303 Mich App 392; 845 NW2d (2013). *Herron*'s holding is binding under MCR 7.215(C)(2) and (J)(1). Accordingly, defendant's argument is without merit.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ William C. Whitbeck